



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Outagamie County Department of Human Services, Petitioner

vs.

██████████ Respondent

DECISION
Case #: FOF – 203648

PRELIMINARY RECITALS

Pursuant to petition filed November 5, 2021, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Outagamie County Department of Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Wednesday, January 26, 2022 at 9:30 A.M. at Madison, Wisconsin. A hearing originally set for December 22, 2021, was rescheduled at the petitioner's request.

The issue for determination is whether the respondent committed a first offense Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Outagamie County Department of Human Services
320 S Walnut St
Appleton, WI 54911-5985

Respondent:

██████████
████████████████████
████████████████████

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Shawano County who received FS benefits in Outagamie County from April 1, 2019 through September 30, 2019.

2. On or about March 6, 2019, the respondent reported (apparently to the Winnebago County agency) that she and her children had moved to Outagamie County. She was instructed to contact the Outagamie County agency to re-open her extant FS benefits case. She thereafter did so. See, Exhibit 6a, attached Case Comments for March 6, 2019.
3. In July, 2019, the respondent reported to the Outagamie County agency that her household composition had not changed. See, Exhibit 6a, attached Case Comments for July 1, 2019.
4. By ACCESS renewal application filed by the respondent online on or about November 19, 2019, she reported that she lived at [REDACTED], together with her four then minor children, [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. See, Exhibit 7a.
5. The respondent continued to report the same 5-person household to the Outagamie County agency on December 23, 2019. June 2, 2020, and May 19, 2021. See, Exhibit 7b; and see, Exhibit 6a, attached Case Comments for June 2, 2020 and May 19, 2021.
6. On or about June 15, 2020, the respondent filed a copy of her lease with the Outagamie County agency, and the lease stated that the petitioner's [REDACTED] apartment was occupied by her and four minor children. See, Exhibit 6a, attached Case Comments for June 2, 2020.
7. On April 13, 2021, the respondent and her then husband entered into a Partial Marital Settlement Agreement providing among other terms that the husband and biological father of the couple's four children would have primary physical placement of the three minor children. The terms provided that the respondent would have placement of the three minor children approximately 31% of the time, while the father had placement approximately 69% of the time.
8. The Winnebago County Circuit Court, by Circuit Court Judge Teresa S. Basiliere, executed a Findings of Fact, Conclusions of Law and Judgement of Divorce in the respondent's divorce case on May 17, 2021, incorporating by reference the terms of the Partial Marital Settlement Agreement described therein and in Finding of Fact No. 2, above.
9. On May 19, 2021, the respondent again filed an ACCESS renewal application and again reported that she lived at [REDACTED], [REDACTED], together with her four then minor children, [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. See, Exhibit 7a.
10. On or about August 11, 2021, the Outagamie County agency received a tip from an unnamed source alleging that [REDACTED] had never lived at the respondent's [REDACTED] apartment, [REDACTED] had last lived with her in November, 2020, and that the other two children had about 40% placement with the respondent. See, Exhibit 6a, attached Case Comments for August 20, 2021.
11. On or about August 21, 2021, the respondent filed a Change Report with the Outagamie County agency reporting that [REDACTED] had moved out of her apartment, and he had turned 18 years old. See, Exhibit 6a, Case Comment dated August 25, 2021.
12. The petitioner agency advised the respondent by mailed information (via a copy of the so-called "IM E&B Booklet") on at least the dates of: November 13, 2018; January 14, 2019; July 2, 2019; and November 16, 2020; of the possibility of the imposition of a FoodShare Intentional Program violation making a household ineligible for one year for a first offense, for fraudulent behaviors or program violations. See, Exhibit 3.

13. On a date unknown subsequent to May 19, 2021, and prior to December 14, 2021, the Outagamie County agency fraud investigator (██████████) spoke with the respondent and inquired about her household's living arrangements. The respondent told her that ██████████ had not lived with her since she moved to ██████████; and that she had kept reporting him as in the household because he was on the lease for the apartment in hope that he would return to live with her.
14. On December 14, 2021, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that The respondent FS recipient had concealed or withheld facts i.e., did not report changes in her household composition. She was reporting on at least May 19, 2021, that ██████████ lived with her when he did not. She was also reporting that her other three minor children were living with her when only days before this report primary physical placement of the other three minor children had been granted to her ex-husband in a divorce judgement.
15. The respondent was the biological mother of a fourth child, ██████████, who is now apparently an emancipated adult (His DOB is in August, 2003.) (It also does not appear from the record that ██████████ is his father, as he is not listed in the pleadings in the divorce action except to note that the court has no jurisdiction over child support ██████████ receives for ██████████.) ██████████ was living with his stepfather, ██████████, in at least June, 2020, and did not reside with the respondent again after that date.
16. The respondent failed to appear for the scheduled January 26, 2022, Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to

commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. *See, John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules by falsely reporting in May, 2021 at review that her four minor children were residing with her when at a minimum, one of them (██████) was not; and that this violation was the first such violation committed by the respondent. This false report of household composition was shown to be a knowing and intentional action, and a violation of 7 C.F.R. § 273.16(c).

The respondent has failed to appear and failed to rebut in any way the agency’s case and evidence in support of its assertion that it has met its burden of proof under the clear and convincing standard. Therefore, I can only conclude that the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that no person may conceal or withhold facts in a food stamp application or report of income; the respondent knowingly and incorrectly reported her household composition in her renewal application dated May 19, 2021 as she reported children were living with her who no longer did so as majority custody (69%) had been given to her ex-husband by a divorce judgement prior to May 19, 2021. (See, Exhibit #2.) This is a violation of 7 C.F.R. §273.16(c)(1).
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

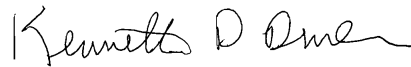
REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one). The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

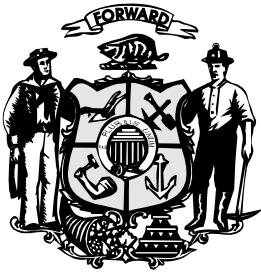
Given under my hand at the City of Madison,
Wisconsin, this 4th day of February, 2022



_____ \s

Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals

East Central IM Partnership - email
c: Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - email



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The preceding decision was sent to the following parties on February 4, 2022.

Outagamie County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]